

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Commonwealth Edison Company :
: **Docket No. 10-0467**
Proposed General Increase in Electric :
Rates :

**VERIFIED MOTION TO STRIKE CERTAIN PORTIONS OF COMED’S RESPONSE
TO THE PETITION FOR INTERLOCUTORY REVIEW OF THE
COALITION TO REQUEST EQUITABLE ALLOCATION OF COSTS TOGETHER**

The Coalition to Request Equitable Allocation of Costs Together (“REACT”), by its attorneys DLA Piper LLP (US) and pursuant to Section 200.190 of the Rules of Practice of the Illinois Commerce Commission (“Commission”), respectfully moves to strike certain portions of the Response of Commonwealth Edison Company (“ComEd”) (“ComEd’s Response”) to REACT’s Petition for Interlocutory Review (“REACT’s Petition”).¹ Because of the timeframe for the submission of the Administrative Law Judges’ Report to the Commission pursuant to Section 200.520(a) of the Rules of Practice, REACT respectfully requests expedited treatment of this Motion.

ComEd’s Response asserts new alleged facts and new arguments, and includes an affidavit of Ross C. Hemphill, Ph.D., (“Hemphill Affidavit”), none of which were included in any filing that ComEd made relating to REACT’s Motion to Dismiss when that Motion was under consideration by the Administrative Law Judges (“ALJs”). Those alleged facts and new arguments should, accordingly, be stricken from the record and should be disregarded by the

¹ The members customer members of REACT currently are: A. Finkl & Sons Company; Aux Sable Liquid Products, LP; the City of Chicago; Flint Hills Resources, LP; FutureMark Paper Company (formerly known as the Alsip Paper Condominium Association); the Metropolitan Water Reclamation District of Greater Chicago; PDV Midwest Refining LLC; United Airlines, Inc.; and Wells Manufacturing Company. All of these REACT customer members participated in the 2007 ComEd Rate Case and the 2008 ComEd Special Investigation Proceeding as members of REACT. REACT’s supplier members currently are Commerce Energy, Inc.; Integrys Energy Services, Inc.; and Interstate Gas Supply of Illinois, Inc. The positions stated herein do not necessarily represent the positions of any individual member of REACT. The City of Chicago does not join in this Motion.

ALJs and the Commission in connection with REACT's Petition. The assertion of new alleged facts and new arguments on interlocutory review contravenes the Commission's policy against such a practice.² In the alternative, if the Commission declines to strike ComEd's new factual assertions and arguments, REACT respectfully requests that the Commission consider the summary responses contained herein.

In support of this Motion, REACT states the following:

I.

INTRODUCTION

As described in more detail in REACT's Petition, REACT's Motion to Dismiss simply attempts to force ComEd to comply with a binding Commission Order. In contravention of the Order in the 2008 Special Investigation Proceeding, ICC Docket No. 08-0532, dated April 21, 2010 ("Special Investigation Proceeding Order"), ComEd did not file all of the required studies and analyses with its initial Rate Case filing – this fact is uncontested.³ ComEd then filed a Verified Motion for Leave to File Supplemental Testimony ("ComEd Motion") seeking special permission to supplement its filing 40 days later, thus limiting the time that parties to this proceeding and the Commission itself will have to evaluate this rate design evidence. In response, the parties filed a series of motions as follows:

² The Commission has specifically expressed that policy in recent circumstances involving a Petition for Interlocutory Review. (See ICC Docket No. 08-0364, *BlueStar Energy Services, Inc. v. American Energy Solutions, Inc., et al.*, Minutes of the Commission's January 7, 2009 Bench Meeting at 2 ("Commissioner O'Connell-Diaz expressed concerns that the Petition for Interlocutory Review contained information not presented to the ALJ by the attorneys; she cautioned the attorneys to review the Commission's rules of practice and have the appropriate information for the ALJ to review in the future.)) This approach squares exactly with the Illinois Supreme Court's view that "[a] party may generally not rely on matters outside the record to support its position on appeal." (*Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009).)

³ ComEd now chooses to refer to the information required by the Special Investigation Proceeding Order as "requested" information. (See, e.g., ComEd Response at 3, 10, 18.) ComEd's description is new; it also is wrong – that information was unambiguously *ordered* to be provided with ComEd's rate case filing. (See Special Investigation Proceeding April 21, 2010 Order, ICC Docket No. 08-0532 at 85.)

- On August 26, 2010, REACT filed a Combined Verified Response to ComEd's Verified Motion for leave to File Supplemental Direct Testimony and Verified Motion to Dismiss the Instant Proceeding ("REACT Motion"), which requested that the Commission dismiss the instant proceeding without prejudice.
- On August 27, 2010, the Illinois Attorney General and Dominion Retail, Inc. filed a similar motion seeking dismissal without prejudice.
- On September 9, 2010, ComEd filed a Combined Reply in Support of Motion for Leave to File Supplemental Direct Testimony and Response to Motions to Dismiss ("ComEd Unverified Reply").
- On September 13, 2010, REACT filed a Verified Reply in Support of its Verified Motion ("REACT Reply").

On September 17, 2010, the ALJs granted the ComEd Motion and denied the REACT Motion, as well as the Attorney General/Dominion Retail joint Motion. On October 8, 2010, REACT filed its Petition for Interlocutory Review. ComEd filed its Response, including the Hemphill Affidavit, on October 15, 2010.

The ComEd Response and the Hemphill Affidavit raise several new arguments and assert new factual allegations that were not asserted in any prior filing. Those arguments and factual assertions should be stricken and disregarded.

II.

THE COMMISSION SHOULD STRIKE THE HEMPHILL AFFIDAVIT IN ITS ENTIRETY AND PORTIONS OF THE COMED RESPONSE

A. The Commission Should Strike The Hemphill Affidavit In Its Entirety

The Hemphill Affidavit is completely new to the record and should be stricken. Neither ComEd's original Motion regarding the Supplemental Testimony nor ComEd's Unverified Reply to the REACT Motion contained any affidavit from any ComEd employee or counsel. ComEd's Unverified Reply did contain unsupported statements of facts, but contained neither a verification nor a supporting affidavit, as was required by the Commission Rules of Procedure. (*See* 83 Ill. Admin. Code § 200.130.) The Commission's Rules of Practice do not allow a party

to submit additional evidence in responding to a Petition for Interlocutory Review. (*See* 83 Ill. Admin. Code § 200.520(a).)

ComEd could have attached the same affidavit to its original Motion or the ComEd Unverified Reply, but apparently made a strategic decision not to do so. ComEd now seeks to improperly “cure” its prior deficient filings, when its assertions cannot be challenged by other parties. The ALJs did not have the Hemphill Affidavit before them at the time of their Ruling, and REACT did not have the Affidavit at the time it filed its Petition – interposing that Affidavit into the record now is plainly improper.

To the extent that the Commission decides not to strike the Hemphill Affidavit, REACT requests that the Commission take note that even now -- after extensive briefing of the issues -- in its 19 paragraph, 9 page affidavit, ComEd still has not provided any explanation regarding why it decided to move forward prematurely with the filing of its rate case, and instead made a filing that this witness recognized was not “compliant” with the Commission’s Order in the Special Investigation Proceeding. (ComEd Ex. 14.0 at 7:157-8:160. *See also* ComEd Ex. 16.0 at 7:155-64 (“ComEd intends to request permission to file supplemental direct testimony to address and incorporate those directives not reflected in this initial filing.”).)

B. The Commission Should Strike ComEd’s Argument Regarding The Exclusivity Of Remedies Available Under The Public Utilities Act

ComEd’s Response argues that Sections 4-202 and 5-202 of the Public Utilities Act (“Act” or “PUA”) (220 ILCS 16/4-202 and 5-202) provide exclusive remedies to the Commission for non-compliance with a Commission Order. (*See* ComEd Response at 16-17.) This argument is new -- ComEd did not raise it in any prior filing, and thus the full paragraph beginning at the bottom of page 16 should be stricken.

In its Unverified Reply, ComEd made only a limited argument contesting the Commission's power to dismiss the proceeding. (*See* ComEd Unverified Reply at 2-5.) REACT responded to that argument, demonstrating that it was totally inconsistent with the notion that the Commission possesses "plenary power" under the Act with respect to supervision of public utilities. (REACT Reply at 3, *citing Abbott Labs, Inc. v. Ill. Commerce Comm'n*, 289 Ill. App. 3d 705, 711, 682 N.E.2d 340, 347 (1st Dist. 1997).) REACT explained that in exercising that plenary power, the Commission possesses "wide discretion to determine what the public interest requires and what measures are necessary for the protection of those interests." (*Peoples Gas Light and Coke Co. v. Ill. Commerce Comm'n*, 165 Ill. App. 3d 325, 246, 520 N.E.2d 46 (1st Dist. 1987).) However, ComEd never raised an argument about Sections 4-202 and 5-202 of the Act, and those arguments should be stricken and disregarded.

To the extent that the Commission declines to strike ComEd's new argument, REACT respectfully requests that the Commission consider that: (1) nothing in the Act indicates that Sections 4-202 and 5-202 are the exclusive remedies available to the Commission for disregard of its Orders, and (2) in its judicial role, the Commission must necessarily have the power to administer its own case docket, which includes the limited power to dismiss without prejudice. As explained in REACT's Reply, the Commission has sufficient statutory authority to regulate its proceedings, which must necessarily include the power to dismiss. (*See, e.g.*, REACT Reply at 8-11.) REACT would be happy to expand on these arguments in a supplemental filing or at Oral Argument, as the Commission deems appropriate.

C. The Commission Should Strike ComEd's Argument Regarding Enforceability Of The Special Investigation Proceeding Order

ComEd introduces another entirely new argument related to the enforceability of the Special Investigation Proceeding Order, suggesting that the Commission must include specific penalties for non-compliance in an Order to make it enforceable. (*See* ComEd Response at 17.) The entire paragraph discussing this on page 17 should be stricken.

Nothing in ComEd's Motion or its Unverified Reply suggested that ComEd believed the Commission must include specific language regarding consequences in an Order to make that Order enforceable. To the contrary, ComEd actually argued that:

[T]he Commission has **no power** to require ComEd to implement all of the Rate Design Order's directives in its initial Rate Case filing, and it would have been unlawful for it to have attempted to do so, or now to penalize ComEd in any way for a failure to do so.

(ComEd Unverified Reply at 7 n.4) (emphasis added). REACT debunked that argument, explaining the basis for the Commission's authority over ComEd and explaining the invalidity of ComEd's various red herring arguments about an alleged rate moratorium and an alleged unconstitutional taking. (*See* REACT Reply at 3-12.) ComEd should not be permitted now to raise a different argument that was not made before the ALJs, and to which REACT had no opportunity to respond.

To the extent that the Commission does not strike ComEd's new argument, REACT respectfully requests that the Commission reject the notion that in each Order it must contemplate -- and explicitly spell out -- what actions the Commission will take in the event that the utility intentionally chooses to ignore the Commission's directives. Such a result would encourage the utilities to engage in some sort of cost-benefit- analysis regarding whether to obey the Commission, which contradicts sound public policy. Further, utilities almost always obey

the Commission; indeed, ComEd's failure to make a compliant rate case filing in response to a prior Commission directive appears to be unprecedented.

Certainly, the new cases ComEd cites do not suggest that the Commission has endorsed ComEd's limited view of the Commission's authority. One new case deals with the Commission providing for exceptional sanctions for failure to file tariffs consistent with a settlement offer made to comply with a federal agency order. (*See Qualified Acceptance of the Verizon N., Inc. and Verizon S., Inc. Enhanced Lifeline Proposal*, ICC Docket No. 01-0467, Order dated June 27, 2001.) The other new case ComEd cites deals a regulated entity's refusal to answer post-Order Data Requests. (*Ill. Comm. Comm'n v. Level 3 Comm'ns*, ICC Docket No. 08-0261, Order dated Apr. 9, 2008.) In neither case was there a prior Commission Order that required the regulated party to comply with specific Commission directions on the submission of specific information with a rate case filing.

At most, these new cases cited by ComEd stand for the proposition that there is nothing to stop the Commission from including explicit sanction language in its Orders. But ComEd cites no authority for the proposition that such language is necessary for the Commission to enforce its Orders applied to the specific entities (e.g., ComEd) over which it has "plenary power" under the Act. REACT would be happy to expand on these arguments in a supplemental filing or at Oral Argument, as the Commission deems appropriate.

D. The Commission Should Strike References To Prior Commission Rulings Allegedly Addressing The Commission's Application Of A "Good Cause" Standard

As part of the discussion of whether ComEd did, in fact, show "good cause" that would justify the ALJs granting it authority to file Supplemental Testimony under Section 260.20(b) of the Commission's Rules, the ComEd Response asserts for the first time that the Commission has interpreted the "good cause" standard "liberally," and cites two new cases. (*See* ComEd

Response at 12.) ComEd's original Motion regarding the Supplemental Testimony did not even cite to Section 260.20(b), and its reference to this provision in its Unverified Reply made no reference to how the Commission had previously interpreted the "good cause" requirement. Neither of the cases -- *Ill. Power Co.*, 2000 Ill. PUC Lexis 41, at *4 (Jan. 4, 2000), and *Day v. Peoples Gas Light & Coke Co.*, Docket No. 03-1512 [sic], 2004 Ill. PUC LEXIS 349, *2-3 (June 23, 2004) -- were cited in ComEd's earlier filings. The entire paragraph in the middle of page 12 of ComEd's Response should be stricken.

To the extent that the Commission does not strike this paragraph, the Commission should be aware that neither case is helpful to ComEd, and together these cases certainly do not suggest that the Commission has interpreted the "good cause" requirement in Section 260.20(b) "liberally." In *Day*, the Commission found that no "good cause" was shown for a witness failing to appear; however, the Commission did not articulate a general standard regarding what constitutes "good cause," and the behavior of plaintiff who filed a complaint *pro se* provides no guidance regarding whether a fully-represented utility knowingly making a filing not in compliance with a Commission Order should be excused for "good cause." The *Illinois Power* case likewise does not set forth any standard for "good cause" to be shown, but this case does not even look to apply a "good cause" requirement -- the Commission merely uses the phrase; furthermore, to the extent the Commission is looking for guidance on how to apply this standard -- as was explained in REACT's Reply -- the Illinois Supreme Court has set out minimum specificity requirements for establishing "good cause," which ComEd has not met. (*See* REACT Motion at 11; REACT Reply at 13-14, *citing Vision Point of Sale, Inc. v. Haas*, 226 Ill. 2d 334, 348 (2007).)

III.

CONCLUSION

ComEd has raised several new arguments in response to the REACT Petition that it did not raise in briefing before the ALJs. Those new arguments should be stricken. In addition, ComEd's addition of the completely new Hemphill Affidavit to attest to facts apparently known since the initial ComEd Motion is similarly untimely and should be stricken.

Accordingly, for the reasons stated herein, REACT respectfully requests that the Commission strike the identified portions of ComEd's Response on pages 12, 16, and 17, and the entirety of the Hemphill Affidavit, or, in the alternative, consider the summary responses contained herein.

Respectfully submitted,

**THE COALITION TO REQUEST EQUITABLE
ALLOCATION OF COSTS TOGETHER**

By: /s/ Christopher J. Townsend
One Of Its Attorneys

Christopher J. Townsend
Christopher N. Skey
Michael R. Strong
DLA Piper LLP (US)
203 North LaSalle Street, Suite 1900
Chicago, Illinois 60601
(312) 368-4000
christopher.townsend@dlapiper.com
christopher.skey@dlapiper.com
michael.strong@dlapiper.com

VERIFICATION

STATE OF ILLINOIS)
COUNTY OF COOK) ss:

Christopher J. Townsend, being first duly sworn, deposes and says that he is counsel for The Coalition To Request Equitable Allocation of Costs Together; that he has read the foregoing document; and that the statements contained therein are true, correct and complete to the best of his knowledge, information and belief.

Christopher J. Townsend

Subscribed and sworn to before me
this ____ day of October, 2010.

Notary Public